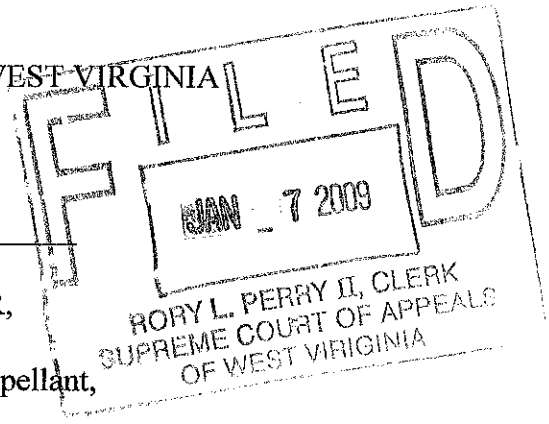
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34157



STATE EX REL. ALEX FARMER,

Petitioner-Appellant,

v.

THOMAS MCBRIDE, Warden,

Respondent-Appellee.

APPELLANT'S BRIEF SEEKING REVERSAL OF DENIAL OF PETITION FOR HABEAS CORPUS

Appeal from Circuit Court of Jefferson County, West Virginia
Order Denying Petition for Habeas Corpus.

Case No. 05-C-102
Honorable Thomas W. Steptoe

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW.....1

STATEMENT OF FACTS.....3

ARGUMENT.....6

I. STANDARD OF REVIEW.....6

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S *ZAIN* CLAIMS.....6

A. *Zain I* Claim.....7

B. *Zain III* Claim.....15

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT WAS NOT CLEARLY WRONG IN DENYING THE PETITIONER'S MOTIONS FOR ACQUITTAL.....18

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION BY FINDING THAT THE COURT DID NOT VIOLATE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BY ADMITTING THE SEROLOGY EVIDENCE FROM THE T-SHIRT, THE SOLE PURPOSE OF WHICH WAS TO PREJUDICE THE JURY.....21

V. THE CIRCUIT COURT ABUSED ITS DISCRETION BY FINDING THAT THE TRIAL COURT DID NOT COMMIT CLEAR ERROR IN ADMITTING THE PETITIONER'S ILLEGALLY OBTAINED STATEMENTS, VIOLATING HIS FIFTH AND SIXTH AMENDMENT RIGHTS.....24

VI. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE PETITIONER WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED TO STRIKE A BIASED JUROR.....26

VII. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT'S DECISION TO ALLOW THE JURY TO HAVE A MAGNIFYING GLASS DID NOT VIOLATE THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.....30

VIII. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE STATE FAILING TO ADEQUATELY INVESTIGATE POSSIBLE FALSE TESTIMONY AND NOT CONDUCTING FURTHER INVESTIGATION AND SEROLOGY TESTING OF OTHER SUSPECTS.....33

IX. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT PETITIONER'S SENTENCE WAS IMPOSED IN CONFORMITY WITH THE LAW.....36

CONCLUSION.....38

CERTIFICATE OF SERVICE.....40

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....37

Arizona v. Youngblood, 488 U.S. 51 (1988).....13, 38

Blakely v. Washington, 542 U.S. 296 (2004).....37

Brady v. Maryland, 373 U.S. 83 (1963).....34

Com. v. Chacko, 459 A.2d 311 (Pa. 1983).....26

Evans v. United States, 883 A.2d 146 (D.C. 2005).....32

Gibson v. Dale, 319 S.E.2d 806 (W. Va. 1984).....23

Illinois v. Fisher, 540 U.S. 544 (2004).....13

In re Renewed Investigation of the State Police Crime Laboratory, Serology Division ("Zain III"), 633 S.E.2d 762 (2006).....1, 5-7, 10, 15-18, 38

Losh v. McKenzie, 277 S.E.2d 606 (1981).....8, 15, 24

Markley v. Coleman, 601 S.E.2d 49 (W. Va. 2004).....8, 15

Mathis v. United States, 391 U.S. 1 (1968).....26

Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div. ("Zain I"), 438 S.E.2d 501(W. Va. 1993).....6-9, 12, 15,16, 38

O'Dell v. Miller, 565 S.E.2d 407 (W. Va. 2002).....28

State v. Allen, 539 S.E.2d 87 (W. Va. 1999).....37

State v. Armstrong, 369 S.E.2d 870 (W. Va. 1988).....30-31

State v. Easton, 510 S.E.2d 465 (W. Va. 1998).....19

State v. Frazier, 253 S.E.2d 534 (1979)..... 18

State v. Guthrie, 461 S.E.2d 163 (W. Va. 1995).....19

State v. Jarvis, 483 S.E.2d 38 (W. Va. 1996).....20

State v. Middleton, 640 S.E.2d 152 (W. Va. 2006).....25

State v. Miller, 363 S.E.2d 504 (1987).....36

State v. Osakalumi, 461 S.E.2d 504 (W. Va. 1995).....13-14

State v. Peacher, 280 S.E.2d 559 (W. Va. 1981).....28

State v. Satterfield, 387 S.E.2d 832 (W. Va. 1989).....34

State v. Schermerhorn, 566 S.E.2d 263 (W. Va. 2002).....28

State v. Sette, 242 S.E.2d 464 (W. Va. 1978).....22

State v. Sprigg, 137 S.E. 746 (1927).....19

State v. Triplett, 421 S.E.2d 511 (1992).....36

State ex. rel. Brown v. Dietrick, 444 S.E.2d 47 (W. Va. 1994).....28

State ex rel. Doe v. Troisi, 459 S.E.2d 139 (W. Va. 1995).....34

State ex. rel. Farmer v. Trent, Case No. 94-P-13, Order (January 30, 1996).....9

State ex rel. Hatcher v. McBride, __ S.E.2d __, 2007 WL 3317186 (W. Va. Nov. 9, 2007).....6

While v. Lock, 332 S.E.2d 240 (W. Va. 1985).....29

Whitfield v. State, 411 A.2d 415 (Md. 1980).....26

STATUTES AND RULES

Fed. R. of Evid. 401.....22

Fed. R. of Evid. 403.....22

W. Va. Code § 53-4A-1.....4, 6, 8, 12,15, 23

W. Va. Code § 62-3-15.....36, 37

ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

I. Did the Circuit Court err in denying Petitioner Farmer's Petition for Habeas Corpus and failing to grant a new trial?

A. Did the Circuit Court err in denying Petitioner's *Zain* claims as previously adjudicated?

1. Did the Circuit Court err in denying Petitioner's *Zain I* claim as previously adjudicated?

2. Did the Circuit Court err in denying Petitioner's *Zain III* claim as previously adjudicated?

B. Did the Circuit Court err in denying Petitioner's claim that the trial court violated his Fourteenth Amendment right to due process by denying his motion for an acquittal?

C. Did the Circuit Court err in denying Petitioner's claim that the trial court violated his Sixth and Fourteenth Amendment right to a fair trial by allowing the introduction of the highly prejudicial and non-relevant evidence of seminal fluid found on Petitioner's shirt?

D. Did the Circuit Court err in denying Petitioner's claim that his Fifth Amendment right was violated when the trial court allowed the introduction of an involuntary statement made by Petitioner while incarcerated in New Jersey?

E. Did the Circuit Court err in denying Petitioner's claim that his Sixth Amendment right to an impartial jury was violated when the trial court failed to disqualify a partial, biased juror?

F. Did the Circuit Court err in denying Petitioner's claim that his Sixth and Fourteenth Amendment rights to a fair trial were violated where the trial court allowed the jury to use a magnifying glass during deliberation?

G. Did the Circuit Court err in denying Petitioner's claim that his sentence was imposed in violation of his West Virginia Constitutional Rights under Article III section 5?

H. Did the Circuit Court err in denying Petitioner's claim that his Sixth and Fourteenth Amendment rights were violated when the prosecution knowingly proffered false testimony from its witnesses?

STATEMENT OF THE FACTS

On April 14, 1987, Marjorie Bouldin was found dead in her home in the Bloomery area of Jefferson County, West Virginia. The Petitioner was identified as a possible suspect in the murder of Marjorie Bouldin.

On June 29, 1989, the Petitioner was arrested and charged with Breaking and Entering, two (2) counts of Sexual Assault and the Murder of Marjorie Bouldin. David Sanders and Lawrence Crofford, private practicing criminal attorneys were appointed to represent the Petitioner by Order of the Circuit Court. The preliminary hearing was held on September 13, 1989 before the Jefferson County Magistrate Charlie Cheezum. Probable cause was found and the case was bound over to the Grand Jury. The only Law Enforcement Officer to testify before the Grand Jury was Deputy Russell Shackelford.

On September 1, 1989, the Petitioner was indicted on two (2) counts of Sexual Assault, Breaking and Entering, and Murder in the 1st Degree. The petitioner's trial was set with a Petit Jury for November 28, 1989. Counsel for the Petitioner, Lawrence Crofford, moved for a continuance of the trial and the court granted his request, resetting the case for trial before the Petit Jury on July 24, 1990.

In January 1990, David Sanders was permitted leave to withdraw as counsel and Kevin D. Mills of the Public Defender Corporation was appointed to assist Lawrence Crofford, the chief counsel for the Petitioner. In June 1990, Lawrence Crofford, announced to the Circuit Court that he was joining the Jefferson County Prosecuting Attorney's Office on July 1, 1990, the eve of the Petitioner's trial. The Circuit Court appointed Kevin D. Mills as chief counsel for the petitioner and appointed Matthew E. Bieniek, of the Public Defender Corporation, to assist Mr. Kevin D.

Mills.

The Petitioner's motions to suppress all statements, to dismiss the indictment based upon Grand Jury misconduct, motion in limine to exclude all photographs, and a motion for sequestration of the jury were all denied. The motion to disqualify the Prosecuting Attorney was granted and Charles Trump was appointed as Special Prosecuting Attorney.

On August 3, 1990, the Petit Jury returned a verdict of Guilty on all counts charged in the indictment with a recommendation on mercy. On August 10, 1990, counsel for the petitioner filed a motion for new trial. The motion for new trial was supplemented on November 5, 1990. On January 25, 1991, the Circuit Court denied the Petitioner's Motion for a New trial.

On July 5, 1991, the Petitioner filed a petition for appeal in the Supreme Court of Appeals of West Virginia seeking review of his convictions. On January 29, 1992, the petition for appeal was denied.

The Petitioner filed a *Zain* habeas, challenging the forensic evidence against him, which was denied on January 30, 1996. On August 23, 1996, the Supreme Court of Appeals of West Virginia denied Petitioner's direct appeal from the denial of his *Zain* habeas.

The Petitioner thereafter filed a petition for writ of habeas corpus pursuant to West Virginia Code 53-4A-1 et seq. Therein, the Petitioner argued that: (1) the trial court violated the petitioner's Fourteenth Amendment of the United States Constitution when it denied the petitioner's motion of a directed verdict of acquittal at the end of the prosecutor's case in chief. There was insufficient evidence to support a guilty verdict beyond a reasonable doubt. (2) The petitioner was denied his Sixth Amendment right to a fair trial when the trial court allowed the state to introduce seminal fluid as evidence at petitioner's trial. (3) The Petitioner's Fifth and

Sixth Amendment rights to the United States Constitution was violated after the Petitioner requested counsel. (4) The Petitioner was denied his right to have a jury free from bias or prejudice, which violated the Petitioner's Sixth Amendment Right to a fair trial. (5) The Petitioner was denied his Sixth Amendment right to a fair trial when the court allowed the jury to have a magnifying glass during deliberations. (6) The Petitioner was denied a fair trial when the prosecutor knowingly used false testimony in their case in chief, and did not have blood test done on any of the other suspects. (7) The Petitioner's sentence was in violation of the Petitioner's West Virginia Constitutional Rights under Article III section 5, and (8) the Petitioner was denied effective assistance of counsel in violation of his Sixth Amendment right to the United States Constitution. However, Ground 8 of the petition was later withdrawn by the Petitioner.

The Petitioner filed a Motion to Amend the Habeas Petition, stating that the recent decision, *In re Renewed Investigation of the State Police Crime Laboratory, Serology Division ("Zain III")*, 633 S.E.2d 762 (2006) allowed for all cases involving Fred Zain, even if previously adjudicated, to be reviewed by the Supreme Court of Appeals for West Virginia. The government opposed the motion and the Motion to Amend was subsequently denied on July 18, 2006. The Petitioner then submitted to the Circuit Court that he would like to vouch the record regarding the denial of the *Zain III* claim.

On August 15, 2007, the Circuit Court denied Petitioner's Petition for Habeas Corpus in its entirety, adopting the Respondent's Proposed Findings of Fact and Conclusions of Law verbatim.

ARGUMENT

I. STANDARD OF REVIEW

"In reviewing challenges to the findings and conclusions of the circuit court, [the Supreme Court of Appeals of West Virginia] appl[ies] a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." *State ex rel. Hatcher v. McBride*, __ S.E.2d __, 2007 WL 3317186 (W. Va. Nov. 9, 2007). Petitioner Farmer submits that the Circuit Court abused its discretion in summarily denying his Petition for Habeas Corpus and failing to grant him a "searching and painstaking" evidentiary hearing on the matter of the false serology reports.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S *ZAIN* CLAIMS

The Circuit Court abused its discretion in finding that the *Zain* claims have already been adjudicated, and thus the Petitioner is not entitled to relief. While the *Zain* claims have been at issue, it does not meet the previously adjudicated standard enunciated in W. Va. Code § 53-4A-1(b), and thus does not cut off the Petitioner's sought relief. Furthermore, the Circuit Court erred in failing to differentiate between Petitioner's *Zain I* and *Zain III* claim. A *Zain I* claim is properly brought where Trooper Fred Zain participated in the testing or presentation of evidence in some way.[1] A *Zain III* claim is properly brought where Trooper Zain did not participate in the testing or presentation of evidence, but a technician at the West Virginia State Police Crime

[1] Under *Zain I*, the falsity of the evidence is presumed, and the Petitioner must merely show that the result of the trial would have been different but for the presentation of the false evidence.

Laboratory either conducted tests or presented evidence during Trooper Zain's tenure, between 1979 and 1999.[2] Because the Petitioner brought both *Zain I* and *Zain III* claims, this Court should individually analyze each claim *de novo* to determine if the claims have been previously adjudicated.

A. *Zain I* Claim

The Circuit Court clearly erred in finding that the Petitioner's *Zain I* claim had been previously adjudicated.. Under *Zain I*, the Supreme Court of Appeals of West Virginia held that Trooper Fred Zain's "pattern of practice and misconduct" was so egregious in "underm[ining] the validity and reliability of any forensic work he performed or reported," that the mere fact that Trooper Zain performed or reported forensic work constitutes "newly discovered evidence." *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div. ("Zain I")*, 438 S.E.2d 501, 504 (W. Va. 1993). Thus, under *Zain I*, the Supreme Court of Appeals of West Virginia found that "any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible in determining whether to award a new trial in any subsequent habeas corpus proceeding," and the only issue is whether without the per se invalid Zain evidence, is "there sufficient evidence to uphold the conviction." *Id.* at 506.

Petitioner states that while the Circuit Court had previously ruled that there was no *Zain I* violation in his case because Trooper Smith, rather than Trooper Zain, presented the serology evidence at trial, this ruling was clearly wrong as indicated by newly discovered evidence that

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[2] Under *Zain III*, there is no per se presumption of falsity, but a Petitioner is entitled to a full and exacting evidentiary hearing on the matter to determine if the evidence was false and whether the introduction of the false evidence affected Petitioner's constitutional rights.

Trooper Smith's testimony relied in whole on tests performed by Trooper Zain. Thus, because newly discovered evidence demonstrates that Trooper Zain performed the serology tests entered into evidence in Petitioner's trial, the *Zain I* claim is not waived as previously adjudicated, and Petitioner should be afforded the per se rule that the tests conducted by Zain and entered into evidence by Smith were false.

W. Va. Code § 53-4A-1(a) states that a prisoner may file a petition for a writ of habeas corpus "if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously adjudicated." W. Va. Code § 53-4A-1(b) then defines "previously adjudicated" by explaining that:

> a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article ... there was a decision on the merits thereof after a full and fair hearing thereon ... unless said decision upon the merits is clearly wrong.

Therefore, for a claim to be precluded on previously adjudicated grounds, there must have been "a decision on the merits thereof after a full and fair hearing." W. Va. Code § 53-4A-1(b). Furthermore, the claim may not be considered previously and finally adjudicated if the "decision upon the merits is clearly wrong." W. Va. Code § 53-4A-1(b). Furthermore, a petitioner may still bring claims based on newly discovered evidence even if a decision has been fully adjudicated. *Markley v. Coleman*, 601 S.E.2d 49, 51 (W. Va. 2004) (quoting *Losh v. McKenzie*, 277 S.E.2d 606 (1981)).

While Petitioner's *Zain I* claim was subject to an order denying the Petition for a Writ of Habeas Corpus on January 30, 1996, such a decision was clearly wrong. In denying the petition,

the Judge reasoned that "[d]ue to the chronology of this case, and even assuming that he would wish to do so, Fred Zain could not have manipulated the results of the testing herein to inculpate Petitioner. Zain's involvement in this case was minimal, at most. He was never a witness. The report he signed was never introduced into evidence...." *State ex. rel. Farmer v. Trent*, Case No. 94-P-13, Order (January 30, 1996). This reasoning was clearly wrong for two reasons. First, Zain's involvement was substantial, not minimal, as evinced by newly discovered evidence resulting from Ted Smith's subsequent testimony, and second, the chronology of the case did not preclude Zain from manipulating the results.[3]

First, Ted Smith's subsequent testimony contradicts his previous testimony and demonstrates that Zain's involvement in the testing was not minimal but was substantial. Smith testified at the Petitioner's trial because Fred Zain had left the police laboratory. During his trial and habeas testimony and in his habeas affidavit, Trooper Smith originally swore that he had personally observed and verified Zain's results.[4] However, Smith testified during his January

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[3] The problem is that the court focuses on the testing of the seminal fluid that was found on Petitioner's own shirt. A test performed by Zain confirmed that the seminal fluid came from the Petitioner. Such a result, though, is not probative. It does not connect the Petitioner to the crime scene or the crime in any way. The court should have been focusing on the other evidence taken from the crime scene, which included massive amount of physical evidence. The fact that all of this physical evidence did not reveal the genetic markers of anyone else besides the victim should be the focus of the *Zain* inquiry.

[4] At trial, Trooper Smith testified that "[w]e identified blood on the fingernail clippings and that blood was consistent with the genetic markers of [the victim]." (July 27, 1990 Trial Tr. 239). In the July 4, 1994 habeas affidavit, Trooper Smith asserted that he had personally participated in the serological testing that Zain reported:

> That with respect to the report... prepared by Fred Zain on May 17, 1988, I participated in the serological testing that was done on the items delineated in that report, I have a specific memory of this... the bodily fluids and genetic markers were identified at that time on the following items: ... fingernail clippings.

Furthermore, at the November 7, 1994 habeas hearing, Trooper Smith testified that he personally witnessed the testing of the fingernail clippings:

> Q: ... Did you participate in testing that identified the existence of blood on those items?

9th, 1998 grand jury appearance that he was merely a mouthpiece during the trial, his only part being to impart to the jury the findings of the tests that Zain himself had conducted. Smith may have written up the report, but the report was based upon Zain's tests and findings.[5] Thus, Zain had ample opportunity to manipulate the serological evidence because he was the only one testing such evidence.[6]

A: I reviewed the work that was done on those items and saw the tests performed.

(Nov. 7, 1994 Habeas Tr. 13-14).

[5] The normal procedure was to have the serologist who tested the evidence testify at the trial. However, because Zain had left the laboratory, other serologists had to take his place at trial, testifying to evidence that Zain alone had tested.

[6] On January 9, 1998, Trooper Smith was called to testify before the Kanawha County Grand Jury that was convened to investigate criminal charges against Fred Zain. Trooper Smith testified, in direct contradiction of his testimony at Petitioner's habeas hearing, that:

> A: Well, the Farmer case is one for example. For example, I was going to tell you. [Zain] had listed on his worksheet a full set of genetic markers off a set of fingernail clippings for blood. I mean, I can't tell you how unusual that is. That just made me wonder, wow, that's real unusual. That's strange.
>
> Q: Are you saying because the blood samples would be very minimal –
>
> A: My own experience is we're lucky to get hardly anything off of fingernails. In that case – and when I looked back through the data on that case, I thought, well, darn there's stuff that I think I should be able to find but can't find. But at the same time, on that case I actually – it was close enough in time when the testing was done, I remember doing tests in that case.
>
> I actually remember doing thins. And so I thought, well, maybe I screwed up or maybe we lost something or whatever. And so, like I say, I issued the report based on that.
>
> ... At that point in time, after the incident, it troubled me so much, I came back and I ordered Brent [Myers] and Jeff [Bowles], "Do not write any reports that you cannot absolutely verify everything that is on that report."

(Jan. 9, 1998 Grand Jury Tr. 28-29).

In fact, the Stolorow/Linhart Report, upon which the *Zain III* decision was based, stated that:

> The review of [Trooper Smith's] testimony raises unsettling questions as to whether or not Trooper Smith was completely forthcoming in his testimony at trial and in the habeas proceedings about his participation in the testing process and his confidence in the reliability of the results Fred Zain wrote on the serology worksheet.

Stolorow and Linhart Report at 27.

Second, the chronology argument assumes that there is only one way that Zain could inculpate a defendant. Such an argument assumes that Zain only produced false positives, making false test results to match the suspect's biological markers. However, Zain could have also produced false negative, which would be equally as inculpatory. Essentially, Zain might have found other biological markers in the serology tests that could have exculpated the petitioner, but failed to make this exculpatory evidence known. While Zain did not know what Petitioner's genetic markers were because at the time of the testing the State had not yet obtained a biological sample, it is possible that Zain was aware that the State had a strong circumstantial case against the Petitioner and that the running of correct biological tests may have led to exculpatory evidence. Not wanting to risk hurting the State's case, Zain may have decided to not run the appropriate tests.

Furthermore, though, while Zain was pro-prosecution, noone can conclusively state the real underlying reasons for his behavior. While in some cases he may have wanted to help the prosecution, other cases of false conclusions and bad testing could have been the result of mere laziness or personal compulsion beyond any logical reasoning. Here, the testimony of Ted Smith clearly establishes that Zain did not run the correct tests on the evidence in the Petitioner's case and falsified results. In his 1998 testimony, which contradicted his previous testimony, Smith testified that in Farmer's case he found problems with Zain's initial results as

> [h]e had listed on his worksheet a full set of genetic markers off a set of fingernail clippings of blood. I mean, I can't tell you how unusual that is.... My own experience is we're lucky to get hardly anything off of fingernails.... when I looked back through the data on that case, I though, well, darn there's stuff that I think I should be able to find but can't find.

(Jan. 9, 1998 Grand Jury Tr. 28-29). Therefore, it is clear that Zain created false results, no

matter what his reasoning for doing so was, clearly violating the Petitioner's right to a fair trial and due process.

Simply stated, there is clear evidence that Zain participated substantially in the testing of the serology evidence and that he falsified the results of that testing. While Trooper Smith testified at trial, his testimony was based upon the unexamined falsified tests performed by Zain. Therefore, the *Zain I* claim should not have been denied, and the order denying it is clearly wrong. As such, Petitioner should be allowed to pursue such claim for relief again, in which all he needs to show is the possibility that the falsified reports had a material effect on the jury's decision. *See* W. Va. Code § 53-4A-1(b).

Here, the Petitioner states that it is beyond contradiction that if proper testing had been conducted on the evidence, the evidence would have had a material effect on the jury's decision. It is clear that Zain did not run the proper test on the evidence, but rather falsified the results. There was a plethora of physical evidence in this case that in all probability should have contained traces of the perpetrator of the crime. When Fred Zain falsified the results on the physical evidence, including the fingernail scrapings and other bodily scrapings, and when Ted Smith testified to those results at trial, such testimony eliminated a potential defense. If the fingernail scrapings and the other evidence had actually been tested, and contained the blood type of a third party, the Petitioner would have had a strong defense. Instead, Smith appears to have fictitiously testified at trial that the fingernail scrapings only contained the blood of the victim. Such testimony could only be characterized as 'non-probative' because the actual results, which may be very probative of innocence, will never be known.

In finding that the falsification of these reports was material, there is a useful analogy to

be made to the suppression of illegally obtained evidence. The rationale behind the suppression of illegally obtained evidence is that such suppression will have a deterrent effect and will prevent the police from engaging in illegal searches and seizures in the future. To not grant the Petitioner's relief in this case based upon the falsified reports would have the effect of rewarding the misconduct of the police. Fred Zain will get the benefit of his illegal and immoral acts. Because he was successful in preventing possible exculpatory evidence from ever being tested, Petitioner cannot challenge the falsification of the evidence. Such a result is clearly inconsistent with a fair and just criminal justice system.

Essentially, Fred Zain's actions in this case constituted the destruction of possible exculpatory, material evidence. He falsified tests that were run on the evidence and then the evidence was destroyed, successfully preventing the Petitioner from ever being able to run the proper tests on the potentially exculpatory evidence. This is the exact situation envisioned by the Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988). "[T]he failure to preserve this 'potentially useful evidence' does not violate due process 'unless a criminal defendant can show bad faith on the part of the police.'" *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004) (quoting *Youngblood*, 488 U.S. at 58). *See also State v. Osakalumi*, 461 S.E.2d 504, 514 (W. Va. 1995). But for the misconduct of Fred Zain in falsifying the reports, the Petitioner would have had the opportunity to actually test the possibly exculpatory evidence. Because the destruction of the evidence was done in bad faith on the part of the police, the Petitioner's due process rights have been violated.

Thus, under the *Arizona v. Youngblood* standard, because the destruction of the possibly exculpatory evidence was done in bad faith by Fred Zain, this Court should grant the Petitioner's

relief in the form of reversal of his conviction with prejudice. Under *Osakalumi*, in determining the relief for a due process violation resulting from the destruction of possibly exculpatory evidence, a court should look to "(1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction." 461 S.E.2d at 512.

In the case *sub judice*, the degree of bad faith is at its apex. Fred Zain engaged in the systematic falsification of reports for years, leading to many wrongful convictions. Here, Fred Zain purposefully falsified results without running actual tests on the plethora of physical evidence recovered from the crime scene. Furthermore, this physical evidence was of the utmost importance to this case. This case involved a vicious and gory rape and murder. This is specifically the type of case where physical evidence plays a huge part in either vindicating or convicting a suspect. The false tests and subsequent destruction of the evidence by Fred Zain resulted in none of the physical evidence being correctly tested. There is absolutely no substitute for this physical evidence, because even though reports remain of the tests conducted on the evidence, the reports were all false. Without the physical evidence, all that remained in this case was highly circumstantial evidence that at best placed the Petitioner near the crime scene. Any rational person would find it highly suspect that this circumstantial evidence could sustain a conviction beyond a reasonable doubt. Thus, because of the outrageous nature of this case, which involved extreme bad faith, where there is no sufficient substitute for the destroyed physical evidence, and where the remaining circumstantial evidence is extremely flimsy, the only fair relief would be the reversal of the conviction and the release of the Petitioner.

B. *Zain III* Claim

In the alternative, if the Court finds that Petitioner is not entitled to *Zain I* relief, Petitioner asserts that he should be afforded a hearing as guaranteed by *Zain III*. Petitioner's *Zain III* claim has also not been finally adjudicated to preclude relief. As stated above, for a claim to be finally adjudicated, there must have been a decision on the merits after a full and fair hearing. *See* W. Va. Code § 53-4A-1(b). There has been no such full and fair hearing or a decision on the merits of Petitioner's *Zain III* claim.

While:

> [a] prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, and applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, *a change in the law, favorable to the applicant, which may be applied retroactively*."

Markley, 601 S.E.2d at 51 (quoting *Losh*, 277 S.E.2d 606). While it is arguable whether the determination of the *Zain II* claim is substantially similar to the *Zain III* claim as to raise *res judicata* issues, the Supreme Court of Appeals of West Virginia specifically changed the law in *Zain III*, giving their holding retroactive effect.

The Supreme Court of Appeals of West Virginia held in *Zain III*, that the rules of res judicata under W. Va. Code § 53-4A-1 were suspended, and:

> [i]n order to guarantee that the serology evidence offered in each prisoner's prosecution will be subject to searching and painstaking scrutiny, this Court holds that a prisoner who was convicted between 1979 and 1999 and against whom a West Virginia State Police Crime Lab serologist, other than Fred Zain, offered evidence may bring a petition for a writ of habeas corpus based on the serology evidence *despite the fact that the prisoner brought a prior habeas corpus challenge to the same serology evidence, and the challenge was finally adjudicated.*

In re Renewed Investigation of State Police Crime Laboratory, Serology ("Zain III"), 633 S.E.2d

762, 770 (W. Va. 2006). Thus, the Court specifically allowed for a *Zain III* claim to be filed despite previous attempts at bringing *Zain I* or *Zain II* habeas corpus challenges.

The State contends that because the special investigators involved in *Zain III* examined the Petitioner's case and found no probative error, such a finding precludes the bringing of a *Zain III* claim. However, such a statement is wrong. First, Petitioner meets the test delineated by *Zain III*. Petitioner was convicted on August 3, 1990, meeting the 1979 through 1999 requirement, and Ted Smith, West Virginia State Police Crime Lab serologist, other than Fred Zain, offered evidence in the original trial.

Second, nothing in the Supreme Court of Appeal's decision states that a party whose case was examined in the investigation is precluded from bringing a petition for a writ of habeas corpus. In fact, the Court reports that the investigation team found numerous instances of errors that "were frequent, recurring and multifaceted, spanning the spectrum of examiners." *Zain III*, 633 S.E.2d at 766. However, the investigators also found that the errors were not as egregious as those committed by Fred Zain, and that many of the errors were not probative. *Id.* Such a finding by investigators, though, does not mean that the defendants whose cases were investigated do not deserve the exacting and thorough review required by the Supreme Court of Appeals. Findings by investigators are much different than a finding by a judicial court. The Supreme Court of Appeals never specifically adopted the holding of the investigators that the errors found were not probative. Instead the Court listened to argument from the prisoners who stated that the investigation results:

> are replete with examples of intentional misconduct including repeated instances of reporting and testifying to nonexistent serology testing; false portrayals of male population frequencies ... characterized as 'a hoax that was perpetrated on West Virginia juries during this period in history not only by Fred Zain but also by... Ted Smith..., the

> repeated overstatement of laboratory results in favor of the prosecution; and the contradictory testimony of Trooper Smith in the *Farmer* case. In addition,... a finding that the errors were non-probative does not validate the work of the serologists because there is no means of knowing what the test results would have shown if all the tests that were reported had actually been conducted. Finally,... whether or not the errors in the lab reports and testimony were intentional, the evidence presented in court fails to meet the reliability requirements of both [*Frye v. United States* and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*].

Id. at 767. Taking this argument, and the argument of the State into consideration that the examples of errors were not as systematic as the errors caused by Fred Zain, the Court held that they "adopt the special judge's report to the extent that it recommends that the evidence offered by serologists, other than Zain, is not subject to invalidation and systematic review of those cases in which serology evidence was presented." Id. However, while not presumptively invalidated, the Court found that a petitioner could bring a habeas claim and have the courts undertake a "searching and painstaking" review. *Id.* at 770. The Court held that "the determination that the serology evidence at issue is not subject to the invalidation strictures and systematic review authorized in *Zain I* does not preclude prisoners against whom these serologists offered evidence from seeking habeas corpus relief under our Post-Conviction Habeas Corpus statute." *Id.* at 768-69.

The Court in deciding whether to hear the Petitioner's *Zain III* claim, should not be hamstrung by the findings of the special investigators. The Supreme Court of Appeals specifically allowed for petitioners to bring *Zain III* claims, despite the investigators own finding on the probative value of the errors. Such a decision, which allows a court to undertake a searching, painstaking and thorough review, recognizes the nature of the criminal justice system in our society. After all, our country's court system is based upon the adversarial process, and both sides should be allowed to forward their best proof and arguments. Decisions made by

other parties outside of judicial proceedings should not affect a petitioner's procedural rights.

Therefore, the Court should find that the *Zain* claims are not precluded by *res judicata* and that the Petitioner is entitled to "a full habeas corpus hearing on the issue of the serology evidence..., [to be] represented by counsel,... [and] the circuit court [should] review the serology evidence presented by the prisoner with searching and painstaking scrutiny." *Id.* at 770. Furthermore, after a full hearing and taking of evidence, this Court should require the "circuit court... to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence is found to be false, whether the prisoner has shown the necessity of a new trial based on the five factors set forth in the syllabus of *State v. Frazier*, 253 S.E.2d 534 (1979)." *Id.*

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT WAS NOT CLEARLY WRONG IN DENYING THE PETITIONER'S MOTIONS FOR ACQUITTAL

Petitioner suggests to this Court that the Circuit Court abused its discretion in finding that the trial court was not clearly wrong in denying the Petitioner's motion for an acquittal based upon insufficient evidence to support a guilty verdict beyond a reasonable doubt. Petitioner states that, even viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would find that reasonable doubt exists to the Petitioner's guilt. Furthermore, Petitioner suggests that the sole reason for his conviction was the improper misapprehension and prejudice of the jury.

The standard for evaluating a motion of acquittal based upon insufficient evidence is as follows:

> [An appellate court's] function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether

> such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

State v. Guthrie, 461 S.E.2d 163, 174 (W. Va. 1995). Furthermore, "[a] reviewing court should not reverse a criminal case on the facts which have been passed upon the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice." *State v. Easton*, 510 S.E.2d 465, 472 (W. Va. 1998) (quoting Syl. pt. 3, *State v. Sprigg*, 137 S.E. 746 (1927)).

Even though the veracity and recollection of many of the witnesses was highly questionable, for the purposes of this analysis the Petitioner will assume that all of the evidence presented by the state was reliable and accurate. Essentially, the state's entire theory was that the crime occurred between 9:30 and 11:00 pm and that the Petitioner was seen in the vicinity of the victim's house during that time period, with the inference being that because Petitioner was in the vicinity of the victim's house, the Petitioner committed the crime. The state presented evidence that the victim was last heard from at 8:00 p.m. and was found at approximately 9:40 a.m., making the crime occur between the hours of 8:00 p.m. on April 14, 1988 and 9:40 a.m. on April 15, 1988. Beyond this timetable, the state could not present evidence at when the crime occurred to any greater specificity. In fact, the state presented evidence that the Petitioner arrived back at the Grims' trailer at 11:00 p.m. and was driven home from there. Thus, because Petitioner left the Grim's trailer at approximately 9:00 to 9:30, for the Petitioner to have committed the murder, the victim must have been killed between 9:30 and 11:00 p.m. In fact, the coroner for Jefferson County, Dr. Miller, testified that death must have occurred much later than 11:00 p.m. (July 25, 1990 Trial Tr. 121-22). Dr. Miller testified that rigor mortis had

started to set in, but was not complete, and if the murder took place when the State suggested, the body would have been in a full state of rigor mortis. According to Dr. Frost, after a person dies, it takes 8 to 10 hours to reach full rigor mortis. *See State v. Jarvis*, 483 S.E.2d 38 (W. Va. 1996). Dr. Miller also testified that Deputy Shirley attempted to have Dr. Miller change the time of death to fit with the State's time line as Dr. Miller's finding did not fit with the theory that the victim was murdered between 9:30 and 11:00 p.m. (July 25, 1990 Trial Tr. 129).

Therefore, the record is plain that the State did not prove beyond a reasonable doubt that the victim's death took place between 9:30 and 11:00 p.m. Based upon the evidence, no rational jury could conclude beyond a reasonable doubt that the murder took place during the only hours when the Petitioner could be placed near the crime scene. Based upon the state's failure to prove the time of the victim's death beyond a reasonable doubt, all of the other circumstantial evidence becomes irrelevant,[7] as taken in the light most favorable to the government, the only thing that the evidence establishes is that Petitioner was in the vicinity of the crime scene between 9:30 and 11:00 p.m. Beyond this circumstantial evidence, there was absolutely no physical evidence that connected the Petitioner to the crime. Thus, the trial court should have granted the Petitioner's motion for acquittal on the murder and sexual assault charges.[8]

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[7] This evidence includes the testimony of Frank Ramsburg, Terry Valencia, and Velma Penwell who reported seeing Petitioner in the victim's neighborhood around 9:00 to 9:45 p.m, the testimony of the Grims, who stated that Petitioner left their trailer at around 9:00 or 9:30 pm and returned around 11:00 p.m., and the Petitioner's supposedly contradictory statements about visiting Sonny Pumphrey during this time. All of this evidence, which was the bulk of the state's case, becomes irrelevant because the state wholly failed to prove that the victim was killed between 9:30 and 11:00 p.m.

[8] Of course, such a finding that the state could not prove beyond a reasonable doubt that the murder occurred between 9:30 and 11:00 p.m. does not cover the burglary charge. The burglary incident could have occurred anytime between 8:00 p.m. and 9:40 a.m. and there was testimony, even though Petitioner asserts that the witnesses were inherently unreliable and biased, that when taken in the light most favorable to the government, constitutes an admission of the burglary on the part of the Petitioner.

Once all of the evidence concerning the Petitioner being in the neighborhood of the crime scene between the hours of 9:30 and 11:00 p.m. is discounted, the only thing that is left is evidence that is not relevant and meant to confuse and inflame the jury. During the trial, the states spent much time presenting to the jury the semen stains on the Petitioner's own pants and shirt, and even presented to the jury the results of the tests on that semen, which proved that the semen belonged to Petitioner. Such evidence was completely irrelevant, as a semen stain on the Petitioner's own clothing is not material to any crime. The only thing that the presentation of this 'evidence' proved is that Petitioner is within the 40 percent of the U.S. population that also had traces of their own bodily fluids on their clothes. (Testimony of Ted Smith, July 27, 1990, Trial Tr. 243-44). Furthermore, this evidence clearly had the probability to and did improperly prejudice the jury. The presentation of this evidence invited the jury to make the impermissible inference that because the crime involved a sexual assault, the semen on Petitioner's own clothes was evidence that he committed the sexual assault. It is clear based on the paucity of other evidence, either direct or circumstantial, that the jury must have convicted the Petitioner based upon consideration of this non-relevant and highly prejudicial 'evidence.' Thus, the Circuit Court abused its discretion in finding that the trial court properly denied the Petitioner's motion for an acquittal.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION BY FINDING THAT THE COURT DID NOT VIOLATE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BY ADMITTING THE SEROLOGY EVIDENCE FROM THE T-SHIRT, THE SOLE PURPOSE OF WHICH WAS TO PREJUDICE THE JURY

The Circuit Court committed clear error and abused its discretion when it found that the Petitioner waived his right to the review of constitutional error in evidentiary decisions.

Furthermore, the Circuit Court clearly erred and abused its discretion in summarily finding that the trial court's ruling admitting the constitutionally infirm evidence was not clearly wrong.

In its order, the Circuit Court does not address Petitioner's contention that the introduction of the seminal fluid on his t-shirt violated his Sixth Amendment and Fourteenth Amendment right to a fair and impartial jury. The Circuit Court merely adopted the State's conclusory statement wholesale, that the Petitioner failed to demonstrate admission of the t-shirt with the seminal fluid was clearly wrong. The Circuit Court offers no reasoning behind this conclusion.

However, it is clear that the seminal fluid found on the Petitioner's own t-shirt was irrelevant and had absolutely no probative value. The seminal fluid does not establish that the Petitioner was at the crime scene nor that the Petitioner participated in a sexual assault. All the seminal fluid on the Petitioner's t-shirt demonstrates is that the petitioner, at some indeterminate time, got some of his own bodily fluids on his own clothes. There was no evidence presented to suggest that the prosecution could establish a time frame during which the semen was deposited on the shirt. Nor did the prosecution present any evidence that the Petitioner's semen was recovered from the crime scene. Therefore, this ruling clearly violated Federal Rule of Evidence 401.

This, in and of itself, does not constitute a constitutional error. However, the introduction of this evidence also violated Federal Rule of Evidence 403, as the severe danger of unfair prejudice from the introduction of this evidence far outweighed the non-existent relevancy of the evidence. The only reasonable conclusion is that this evidence was introduced solely to prejudice and mislead the jury. *See State v. Sette*, 242 S.E.2d 464, 471 (W. Va. 1978). The

introduction of this evidence prejudiced the jury, because even though the Petitioner's seminal fluid found on his own clothes is not relevant to any material fact in concluding that he murdered or sexually assaulted the victim, the jury would assume a link between such evidence and the sexual assault of the victim. Moreover, the introduction of such evidence sought to inflame the jury by painting a picture of the Petitioner as a sexual deviant. The jury was asked to and did make the spurious logical leap that if the Petitioner could not control such bodily functions, it was also likely that the Petitioner would not also be able to control such deviant urges that motivated such a gruesome and heinous crime. Clearly, the wrongful introduction of this type of evidence to prejudice a jury against a defendant is a violation of the Sixth and Fourteenth Amendments' guarantees of a fair trial.

Furthermore, the Circuit Court seems to be basing its ruling based upon the erroneous assumption that the Petitioner waived this claim by failing to object to the introduction of the evidence at trial. While the Circuit Court does not directly cite to it, W. Va. Code § 53-4A-1 sets the standard for the waiver of contentions. W. Va. Code § 53-4A-1(a) states that a petitioner is not entitled to habeas corpus relief for claims that have been waived. Furthermore, W. Va. Code § 53-4A-1[c] defines what constitutes waiver by stating:

> a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal,... or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence....

W. Va. Code § 53-4A-1[c]. The waiver provisions of the habeas statute only kick in when there is "a knowing and intelligent waiver, in the vein of a waiver of a constitutional right, which cannot be presumed from a silent record." *Gibson v. Dale*, 319 S.E.2d 806, 811 (W. Va. 1984)

(citing *Losh*, 277 S.E.2d 606). Habeas corpus review is not the same as appellate review, and the strict rule that the Circuit Court cites to, that objections on non-jurisdictional grounds must be made in the lower court to preserve the issue for appeal, is not applicable in the habeas context. Instead, for a waiver to be effectuated, it must be knowing and intelligent. There is no indication that the Petitioner knowingly and intelligently waived his right to review of this issue in the habeas proceedings.

The Supreme Court of Appeals of West Virginia has provided for a procedure to determine if certain claims have been waived, known as a *Losh* list. *Losh*, 277 S.E.2d at 611. The Circuit Court specifically cites that the Petitioner filed a *Losh* list, with one of the non-waived grounds being "constitutional errors in evidentiary rulings." The Petitioner is arguing a violation of his Sixth Amendment right in the trial court's ruling that the seminal fluid on his t-shirt was admissible evidence. Therefore, it is apparent that this ground has not been knowingly and intelligently waived by the Petitioner. Thus, the Petitioner is entitled to relief for the deprivation of his Sixth and Fourteenth Amendment rights when the trial court, in clear error, admitted this irrelevant and extremely prejudicial piece of evidence.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT DID NOT COMMIT CLEAR ERROR IN ADMITTING THE PETITIONER'S ILLEGALLY OBTAINED STATEMENTS, VIOLATING HIS FIFTH AND SIXTH AMENDMENT RIGHTS

The Petitioner claimed that his Fifth and Sixth Amendment rights were violated when the trial court erroneously admitted statements made by the Petitioner during interrogation, while in custody, and after he requested counsel. The Circuit Court did not deny that the Petitioner made these statements while being interrogated *after* he had requested counsel. Instead, the Circuit Court found that the Petitioner was not in a custodial setting at the time the statements were

made. The Petitioner submits that the Circuit Court's finding that the Petitioner was not in a custodial setting when the involuntary statements were made constitutes clear error.

The Supreme Court of Appeals of West Virginia has held that "[a] trial court's determination of whether a custodial interrogation environment exists for purposes of giving Miranda warnings to a suspect is based upon whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." Syl. Pt. 1, *State v. Middleton*, 640 S.E.2d 152, 156 (W. Va. 2006). Furthermore:

> [t]he factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists ... include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.

Syl. Pt. 2, *Id.* at 156.

This holding makes clear that an actual arrest is not the determinative factor for analyzing whether a custodial interrogation environment exists. Therefore, the State's argument that the interrogation at the New Jersey prison was non-custodial because the Petitioner was never arrested for crimes committed in West Virginia is insufficient to establish that the Petitioner was not being held for custodial interrogation. This was clearly a custodial interrogation, as the Petitioner was under arrest for other crimes, was being interrogated in a prison, the most custodial of environments, and was being interrogated by two police officers. A reasonable person, in such a situation would consider his freedom of action curtailed to a degree associated with a formal arrest. In fact, his freedom of action was objectively curtailed, as this interrogation took place while the Petitioner was in prison. Thus, when the Petitioner requested his lawyer, the

interrogation should have stopped.

While there are no West Virginia cases on point, other courts have held that a suspect who is interrogated while imprisoned on other charges unrelated to the interrogation is in custody for purposes of *Miranda*. The Court of Appeals of Maryland adopted the Supreme Court's standard that 'custody' for *Miranda* purpose includes "questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense." *Whitfield v. State*, 411 A.2d 415, 420 (Md. 1980) (quoting *Mathis v. United States*, 391 U.S. 1 (1968)). The Supreme Court reasoned that "[t]here is no substance to... a distinction" between "questioning one who is 'in custody' in connection with the very case under investigation" and one in custody in connection with an independent case. *Mathis*, 391 U.S. at 4. Such a distinction would go "against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. [The Supreme Court found] nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." *Id.* at 4-5. *See also Com. v. Chacko*, 459 A.2d 311, 315 (Pa. 1983).

Therefore, Petitioner's statements made to the police officer while in prison on unrelated crimes constitutes 'custody' for *Miranda* purposes. Therefore, the statements made by the petitioner after his request for a lawyer are clearly inadmissible, and the erroneous inclusion of the statements violated the Petitioner's Fifth and Sixth Amendment rights. Thus, Petitioner is entitled to a new trial.

VI. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE PETITIONER WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED TO STRIKE A BIASED JUROR

The Petitioner claims that his Sixth Amendment right to an impartial jury was violated when the trial court refused to strike Juror Cook because Juror Cook's employer had informed her that there was a conflict of interest with her serving on the jury because her employer had administered the estate of the decedent. The Circuit Court correctly points out that the trial court should examine the totality of the circumstances around Juror Cook's possible impartiality. However, the Circuit Court then relies upon the fact that Ms. Cook expressed that she was fair and impartial to hold that the trial court did not abuse its discretion in failing to strike her.

The relevant facts are as follows. On the first day of trial, the trial court excused a juror that fell ill and empaneled an alternate. (July 25, 1990 Trial Tr. 4-5). Because the empaneling of the alternate juror totally depleted the alternate panel, the defense immediately moved for the court to conduct a voir dire to establish another panel of alternates. (July 25, 1990 Trial Tr. 5). The state refused to stipulate to the court conducting additional voir dire and no additional alternate was selected. (July 25, 1990 Trial Tr. 6). During the lunch break of the first day of trial, the judge received a note from Juror Cheryl Cook, stating that she was concerned about a conflict of interest with her serving on the jury because she just found out that her employer, Charles Town bank, was handling Ms. Bouldin's estate. (July 25, 1990 Trial Tr. 94). Juror Cook was concerned because the vice president of the bank, "went on a rampage saying that [Juror Cook] shouldn't be on the trial." (July 25, 1990 Trial Tr. 100). Defense counsel moved to disqualify Ms. Cook because of this conflict of interest. (July 25, 1990 Trial Tr. 102). The trial court was concerned, however, because the practical effect of disqualifying Juror Cook would have been the declaration of a mistrial, as no alternates existed to replace her. (July 25, 1990 Trial Tr. 102-03). The trial court denied the motion for disqualification, holding that Juror

Cook's statement that she could be fair and impartial was sufficient. (July 25, 1990 Trial Tr. 108).

"The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 4, *State v. Peacher*, 280 S.E.2d 559 (W. Va. 1981). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *State ex. rel. Brown v. Dietrick*, 444 S.E.2d 47, 51 (W. Va. 1994) (citations omitted). "The object of jury selection is to secure jurors who are not only free from improper prejudice or bias, but who are also free from the suspicion of improper prejudice or bias.... [T]rial courts should strive to secure jurors who are not only free from prejudice or bias, but also are not even subject to any well-grounded suspicion of any prejudice or bias." *State v. Schermerhorn*, 566 S.E.2d 263, 267 (W. Va. 2002) (citations omitted).

Furthermore, the Supreme Court of Appeals has held that "[i]t is not for the juror to decide whether he can render a verdict solely on the evidence. The discretion to decide whether a prospective juror can render a verdict solely on the evidence is an issue for the trial judge to resolve." *O'Dell v. Miller*, 565 S.E.2d 407, 411 (W. Va. 2002). The Court continues that:

> [i]t is not enough if a juror believes that he can be impartial and fair. The court in exercising [its] discretion must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously. A mere statement by the juror that he will be fair and afford the parties a fair trial becomes less meaningful in light of other testimony and facts which at least suggest the probability of bias.

Id.

Particularly, a strong suspicion of impartiality exists where a juror's employer has an interest, pecuniary or otherwise, in the case. *While v. Lock*, 332 S.E.2d 240, 243 (W. Va. 1985). Here, the bank that Juror Cook worked for was involved with administering the estate of the decedent. The president and vice-president of the bank informed Ms. Cook that they believed she had a conflict of interest and should not serve on the jury. Juror Cook described the vice-president of the bank, someone that had authority over the employment of Juror Cook, as going "on a rampage" about Juror Cook's conflict of interest in serving on the jury. (July 25, 1990 Trial Tr. 100).

Because the bank was handling the victim's estate, the outcome of the criminal trial could have affected the bank's pecuniary interests. A criminal conviction might convince the decedent's family to pursue a civil action, and any reward from the civil action would go to the decedent's estate and would be handled by Ms. Cook's employer. Thus, Ms. Cook's employer had a possible pecuniary interest in the proceedings. Ms. Cook may have then been conflicted between the pecuniary interest of her employer and her oath of impartiality as a juror.

Furthermore, Ms. Cook definitely had a self-interest in satisfying the vice-president of the bank that employed her. Ms. Cook was aware of the vice-president's reaction emotional reaction to discovering that Ms. Cook was serving on the jury and it is feasible that she would not want to further upset someone that had direct control over her employment.

Furthermore, it is entirely possible that the trial court refused to disqualify Ms. Cook because they had not selected another alternate. Far from being irrelevant, as the Circuit Court held, such a potential for mistrial could have reasonably persuaded the trial court not to disqualify Ms. Cook even though the totality of circumstances demonstrated that her impartiality

was questionable. The refusal to empanel another alternate juror along with the refusal to strike Ms. Cook represented a constitutional error on the part of the trial court, violating the Petitioner's Sixth Amendment and Fourteenth Amendment rights. Petitioner is entitled to a jury that is free from any bias or impartiality, which he was denied by the refusal of the trial court to disqualify a juror who presented a reasonable probability of bias. Thus, the Circuit Court abused its discretion in holding that the that trial court properly denied the motion to disqualify the biased juror.

VII. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE TRIAL COURT'S DECISION TO ALLOW THE JURY TO HAVE A MAGNIFYING GLASS DID NOT VIOLATE THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

The Petitioner claims that his Sixth and Fourteenth Amendment right to a fair trial was violated when the trial court, without asking the purpose of the request, allowed the jury to bring a magnifying glass into the jury room. The Circuit Court abused its discretion in finding that the trial court properly allowed the jury to use the magnifying glass.

The West Virginia Supreme Court of Appeals has held that "[i]t would be improper for the jury to experiment, out of the presence of the accused, with an article which had been introduced in evidence, in a manner otherwise than had been shown in trial, for such would be, in effect, taking evidence out of the presence of the accused." *State v. Armstrong*, 369 S.E.2d 870, 881 (W. Va. 1988) (overturned on other grounds). Thus, during deliberations, "the jury ... may use an exhibit, admitted into evidence, according to its nature and within the bounds of the evidence at trial...." *Id.*

As stated in the original Proposed Findings of Fact and Conclusions of Law, some of the evidence at trial involved footprints that were found around the victim's house. A witness

testified that he could not determine if those footprints matched the sneakers worn by the Petitioner. Thus, if the jury used the magnifying glass to examine the pictures of the footprints to determine if the footprints belonged to the Petitioner, the jury would be experimenting out of the presence of the accused with evidence, in a manner otherwise than had been shown in trial. *See id.*

The Circuit Court erroneously found that the magnifying glass is indistinguishable from corrective eyeglasses and is not extrinsic evidence. First, the comparison of the magnifying glass to corrective glasses is not apt. Corrective eyeglasses are simply that, corrective. They are designed to correct someone's vision to make that person's vision as good as it would be without their eye problems. On the other hand, a magnifying glass may be corrective in that it helps certain people to read by enlarging letters, but it is also enhancing, as it will allow someone with normal vision to see different objects better than they would have if they merely relied upon normal eyesight. While the magnifying glass would have been appropriate to give to a juror to correct their eyesight, and help them read small print, it is not appropriate to give to the jurors so that they can wield the magnifying glass like Sherlock Holmes, in search of their own clues and evidence.

Because of the nature of jury deliberations, the Petitioner does not know exactly what the jurors used the magnifying glass for. The problem, though, is that the trial court also did not know what the jurors used the magnifying glass for. When the jurors requested the glass, the trial court should have at least inquired about the reasons for the request and warned the jurors that they were not to conduct their own experiments. However, the trial court failed to properly inquire about the jurors' reasons and failed to properly warn the jurors' as to the proper use of the

magnifying glass.

Second, while the magnifying glass is not extrinsic evidence in itself, the experiments that the jurors undertake with the magnifying glass and the conclusions that they reach from those experiments represents the extrinsic evidence that had been taken out of the presence of the accused. The Circuit Court confused the means with the end. The magnifying glass was the means by which the jurors were able to obtain the end, of extrinsic evidence outside the presence of the accused.

Furthermore, all the cases cited by the Circuit Court found that jurors' use of magnifying glasses did not constitute juror misconduct involve situations where one juror informed the judge of another juror improperly using the magnifying glass. Thus, in these cases the judge always knew what the magnifying glass was being used for. In our case, the trial court stuck its head in the sand, and thus had no idea what the jurors could have been using the magnifying glass for.

Also, all the cases relied upon by the Circuit Court make the finding that no new evidence was found by use of the magnifying glass because it was merely used to more critically examine admissible evidence from the trial. Thus, fingerprints that were identified by an expert as the defendants were allowed to be examined by a magnifying glass. *Evans v. United States*, 883 A.2d 146, 151 (D.C. 2005). Here, however, the jury was not only seeking to more critically examine the admissible evidence, but they were seeking to find their own evidence through admitted exhibits. In the instant case, there was not a lot of physical evidence that would necessitate a magnifying glass. There were no fingerprints, bite marks, or any other physical evidence that had been identified as belonging to the Petitioner that could have necessitated a more critical examination. Instead, the case was based upon circumstantial evidence, which the

magnifying glass would not help to illuminate. The most likely conclusion is that the jurors used the magnifying glass to conduct experiments and find their own evidence, like the comparison of the Petitioner's shoes with the photographs of the unidentifiable footprints.

Thus, because based on the facts of this case it is a reasonable assumption that the jury conducted impermissible experiments with the magnifying glass and the trial court did not inquire about the reasons why the jury needed the glass, the trial court's decision to allow the jury to use a magnifying glass violated the Petitioner's Sixth and Fourteenth Amendment rights to a fair trial. Therefore, the Circuit Court abused its discretion in finding that the magnifying glass was properly admitted.

VIII. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT THE PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE STATE FAILING TO ADEQUATELY INVESTIGATE POSSIBLE FALSE TESTIMONY AND NOT CONDUCTING FURTHER INVESTIGATION AND SEROLOGY TESTING OF OTHER SUSPECTS

The Petitioner states that the Circuit Court abused its discretion in finding that there was no evidence of any false testimony offered by witnesses. Petitioner states that the Circuit Court has misapprehended Petitioner's claim. Petitioner avers that his constitutional due process rights were violated when the state operated with wilful tunnel vision and failed to sufficiently and adequately investigate other possible suspects and the veracity of witnesses' statements.

The state had nothing but the flimsiest of circumstantial evidence against the Petitioner and lacked any physical or direct evidence connecting the Petitioner to the crime. Yet, the state chose to put the cart before the horse, and in investigating the murder of Ms. Bouldin, started with the presumption that Petitioner was the culprit and compiled evidence to fit that presumption and ignored evidence to the contrary. Any objectively fair investigation would have

presumed the innocence of the Petitioner and would have involved collecting all evidence, even that evidence which may tend to exculpate the Petitioner.

It is undisputed that prosecutors have the important discretionary power to bring charges against a suspect, but this power must be wielded cautiously. "Before exercising this discretion, the prosecutor has a duty to investigate the facts, with care and accuracy, to examine the available evidence, the law and the facts, and intelligently to weight the chances of successful termination of the prosecution." *State v. Satterfield*, 387 S.E.2d 832, 834 (W. Va. 1989). This duty to investigate all evidence, whether inculpatory or exculpatory, is also found in the function of grand juries, which are "charged with the duty to investigate the possibility of criminal behavior while protecting the innocent from unjust accusation." *State ex rel. Doe v. Troisi*, 459 S.E.2d 139, 145 (W. Va. 1995) (citation omitted). Moreover, this duty to investigate is the underlying principle of *Brady* jurisprudence, which holds that an accused should be afforded any exculpatory evidence held by the state. *Brady v. Maryland*, 373 U.S. 83 (1963). Without a duty to investigate, competent prosecutors would choose to remain wilfully ignorant as to deprive the accused of the use of exculpatory evidence.

Here, the state failed to adequately investigate this crime in all stages of the case, from the initial police investigation to the grand jury stage to the actual trial. There were multiple suspects at the beginning of the police investigation, yet the police failed to adequately investigate any of the other suspects. The Deputy Robert Shirley, the investigating officer, testified that beyond a few five-minute long conversations with the other suspects, no other investigatory steps were taken. (July 27, 1990 Trial Tr. 137). The investigators had a crime scene that was rife with physical evidence, including bodily fluids, rug fibers, fingerprints, and footprints. The

petitioner's physical samples did not match any of the physical samples from the scene, including samples taken from the victim's fingernails, from the victim's body, or from the copious amount of blood at the scene. Nor did the investigators match any of the rug fibers from the victim's house to fibers on the Petitioner's clothing. Nor did the Petitioner's fingerprints match any of the fingerprints found at the scene. Yet, even after the investigators could not connect any of the physical evidence to the Petitioner, the investigators failed to retrieve physical samples from the other suspects. Such a derogation of duty is unconscionable. This was not a 'clean' crime. It was an extremely violent and messy murder, which included vaginal and anal sexual assault. Any competent investigator would expect to find some physical connection between the suspect and the scene. When no connection was found, this should have provided the impetus for the investigators to take physical samples from the other suspects. Yet no such actions occurred. Instead, the investigators continued with their dogged tunnel vision pursuit of the Petitioner, ignoring the lack of physical evidence and building a case through nothing but flimsy, circumstantial evidence.

Moreover, all of this investigation could not have been conducted by the Petitioner himself. Petitioner had no power to obtain physical samples from the other suspects. Such power was in the unique control of the state, making its failure to properly investigate even more detrimental to the Petitioner's due process rights. In fact, the trial court denied the Petitioner's motion to order testing of the other suspects. Thus, Petitioner was left at the whim of the state's constitutionally inadequate investigation.

Furthermore, the state presented testimony of David Tomlin and James Lang that the Petitioner admitted that he broke into the victim's house but did not murder her and that the

Petitioner made this statement in front of many other people. (July 3, 1990 Trial Tr. 105-06, 110-11). Yet the state failed to question these other persons to corroborate the statements of two witnesses whose perceptions of the event and freedoms from bias were highly questionable.

Based on the state's total failure to investigate into probable exculpatory evidence, in which the power to investigate was in sole possession of the state, the Petitioner has been totally deprived of his due process rights to a fair trial. Thus, the Circuit Court abused its discretion in finding that the Petitioner was not entitled to a new trial based upon these due process violations.

IX. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT PETITIONER'S SENTENCE WAS IMPOSED IN CONFORMITY WITH THE LAW

Petitioner suggests that the Circuit Court abused its discretion in finding that his sentence was imposed in conformity with the law. Petitioner claims that his sentence was imposed in violation of the West Virginia Constitution, Article III, Section 5 and the Sixth Amendment. In imposing consecutive sentences which will in effect imprison the Petitioner for the rest of his natural life, the sentencing court frustrated the intent and purpose of the jury recommendation of mercy. Therefore, the sentencing court erred by imposing a sentence that was in excess of the sentence authorized by the jury's findings.

"Under both statutory and case law, the recommendation of mercy in a first degree murder case lies solely in the discretion of the jury." *State v. Triplett*, 421 S.E.2d 511, 520 (1992). *See also State v. Miller*, 363 S.E.2d 504 (1987). West Virginia Code 62-3-15 provides as follows:

> If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree..., he or she shall be

> punished by imprisonment in the penitentiary for life, and he or she... shall not be eligible for parole: Provided, that the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole... except that,... such person shall not be eligible for parole until he or she has served fifteen years....

W. Va. Code § 62-3-15.

While it is true, that "[w]hen a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentence run concurrently, and unless it does so provide, the sentences will run consecutively," Syl. Pt. 3, *State v. Allen*, 539 S.E.2d 87, 90 (W. Va. 1999), where a jury makes a finding, it would be an abuse of discretion and a violation of the defendant's constitutional rights for the sentencing court to impose punishment that is contrary to the sentence authorized by the jury's findings. *See Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

On August 3, 1990, the jury returned a verdict against Mr. Farmer on all the counts, First Degree Murder, two counts of First Degree Sexual Assault and Burglary, with a recommendation of mercy. Despite the recommendation of mercy, the sentencing court imposed the sentences to run consecutively, insuring that the Petitioner would spend the rest of his natural life in prison without the possibility of parole. Essentially, the imposition of consecutive sentences frustrated the finding of the jury, that the Petitioner should be sentenced to life in prison, but should be eligible for parole. In doing so, the sentencing court violated the Petitioner's Sixth Amendment right to a jury trial, by imposing a sentence that was not authorized by the jury's verdict. It does not make sense that a jury would be required to make a finding of mercy or no mercy and then the sentencing court would be able to essentially veto such a finding by imposing consecutive

sentences. Such a result is nothing more than the sentencing court substituting its own judgment over the judgment of the jury. The Sixth Amendment bars such actions, and such frustration of the jury's findings surely represents an abuse of the sentencing court's discretion to impose consecutive or concurrent sentences.

Therefore, by imposing consecutive sentences and thereby frustrating the intent of the jury that the Petitioner be treated with mercy, the sentencing court erred in imposing a sentence upon the Petitioner which was in excess of the sentence authorized by the jury's findings. Thus, the Circuit Court abused its discretion in finding that the Petitioner's sentence was imposed in conformity with the law.

CONCLUSION

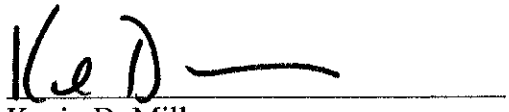
In conclusion, the Petitioner suggests to this Court that the Circuit Court abused its discretion when it adopted the state's position wholesale and summarily denied the Petitioner's requested relief. Petitioner argues that the Circuit Court abused its discretion in denying his *Zain* claims. First, Petitioner states that the Circuit Court should have granted his *Zain I* claim. Even though this claim was previously litigated, information has surfaced in the form of Trooper Smith's grand jury testimony suggesting that he did not participate in the actual testing of evidence that Zain had previously tested, that has indicated that the holding from the original habeas was clearly wrong. Therefore, because Trooper Smith has admitted that solely Zain had falsely and incorrectly conducted the tests on the evidence, Petitioner should be entitled to a presumption as to the falsity of the tests. Furthermore, Petitioner has demonstrated materiality through *Arizona v. Youngblood* based on the destruction of the possibly exculpatory material caused by the bad faith actions of Zain. Thus, Petitioner asserts that his convictions should be

reversed with prejudice. Alternatively, Petitioner asserts that if the Court finds that a *Zain I* claim is unavailable, Petitioner is entitled to the full and exacting hearing required by *Zain III.*

Petitioner also asserts that this Court should find that the Circuit Court abused its discretion in finding that there was sufficient evidence to support the verdict and that his motion for an acquittal should have been granted. Petitioner also suggests that he is entitled to a reversal of his conviction and a new trial based upon the introduction of non-probative, prejudicial evidence, the failure of the trial court to dismiss an objectively biased juror, the trial court's failure to suppress a statement that was taken in violation of Petitioner's *Miranda* rights, the trial court's ruling allowing the jury to conduct its own tests using a magnifying glass outside of the presence of the Petitioner, and the state's failure to properly investigate possibly exculpatory evidence. Further, Petitioner states that his sentence was imposed in contradiction of the jury's verdict and requests that the Court remand his case for re-sentencing.

Finally, Petitioner respectfully requests oral argument before this Court to further develop his position.

Respectfully Submitted,



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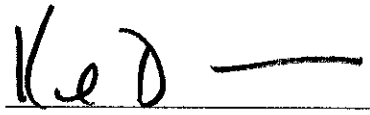
CERTIFICATE OF SERVICE

I, Kevin D. Mills, hereby certify that an original plus nine (9) copies of this brief was served , via Federal Express, postage pre-paid, upon Rory Perry, Clerk of the West Virginia Supreme Court of Appeals at Room E-301, State Capitol, Charleston, West Virginia 25305 and one (1) copy upon Christopher C. Quasebarth, Special Assistant Prosecuting Attorney for Berkeley County by mailing same by U.S. Mail, postage prepaid to 380 W. South Street, Martinsburg, WV 25401 both this 6th day of January, 2009.

Respectfully Submitted,



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